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No. 93-1557

IN THE

Supreme Court of the United States

October Term, 1993

CARL V. LAMB,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent argues to this Court that it should *affirm the denial of Petitioner's Constitutional right* because the denial was by an unpublished per curiam affirmance and therefore not many people will know about it. This Court was presented with a somewhat similar situation in *Boag v. MacDougall*, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982) and decided the case by Granting Certiorari and remanding the case for Trial.

I. The Court Should Grant The Petition. To Do Otherwise Would Narrow The Constitution By Failing To Preserve Its Provisions.

Respondent argues that the decision of the Appeals Court for The Fourth Circuit is not in conflict with the decision of the Appeals Court for The Second Circuit in *Weldy v. Piedmont Airlines,* 985 F.2d 57 (2nd Cir. 1993) and then argues that the plaintiff in Weldy provided concrete evidentiary support for his theory of malice, implying that petitioner has not. Weldy was allowed to present his case to a jury, before the court decided the case on a Motion for a directed verdict. Petitioner has not had that opportunity. Respondent then argues that another states law is involved in Weldy. Petitioner sees no significant difference between New York Law and West Virginia Law on this issue.

Mr. Mabie's malice is indicated by his denial, under oath, that he made any statement at all. Mabie's affidavit is attached to this reply as an Appendix at page A1. The lack of good faith and belief in the truth of the statement, in order to be protected by the qualified privilege, are obvious. Petitioner can find no case where the defense of qualified privilege has been allowed to defeat a plaintiff where the making of the statement has been denied. "In every case where a communication would otherwise be privileged, falsehood and the absence of probable cause will amount to proof of malice." *White v. Nichols,* 3 How. 266 11 L.Ed. 591 (1845). Petitioner made the Fourth Circuit Appeals Court aware of the ruling in Weldy prior to that Court reaching it's Decision and cannot now help but wonder why The Fourth Circuit did not address the issue.

If this Court, aware of the conflict of genuine material facts that are for a jury, follows the reasoning advanced by the Respondent for denying Certiorari, it will act contrary to previous pronouncements of the Court. This Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 257 (1986), made it clear that in order to defeat Summary Judgment, a plaintiff need only present evidence from which a Jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

Respondent alleges that Petitioner's petition contains numerous factual allegations that are unsupported by affidavits, or not argued in the Courts below, *but fails to name any whatsoever.*

In its statement of the case, Respondent misstates the case with respect to the Magistrate's actions. The facts *are* that when Respondent motioned for Summary Judgment and simultaneously to quash Petitioner's discovery, the Magistrate quashed Petitioner's interrogatories, allowing Petitioner the answers to two questions, *altered* the record of the hearing to *erase* the comments wherein he made clear to Petitioner that he was not going to get any discovery and simultaneously *erased* certain of Petitioner's statements, *allowed* the Respondent to file a supplemental pleading to support its Motion for Summary Judgment, *instructed* the Respondent to draw the Court's Order relating to the discovery, which was then issued without giving the Petitioner an opportunity to review the agreed discovery wording and denied Petitioner's Motion to correct the inaccurate wording. Petitioner filed his response to Respondent's Motion for Summary Judgment *prior* to discovery. Petitioner filed his answer to Respondent's Supplemental pleading *after* discovery. The hearing was

devoted primarily to the discovery issue, and lasted only 30 minutes. *No hearing* was held following discovery. Subsequently, the Magistrate copied Respondent's pleadings and affidavits and issued them as his report. The Magistrate's report does not contain a single conclusion that has not been copied from the pleadings of the Defendant. Not a single law case has been cited that was not copied from the Defendant. The Magistrate's conclusions, regarding whether or not Mabie's slander was published, assume that an occasion of qualified privilege cannot be abused, which is contrary to established principles of law and has been answered in Petitioner's Petition. The Magistrate's conclusions regarding the testimony of Epps, that he had never heard of the Plaintiff, are answered in Petitioner's Petition. His conclusions that Petitioner did not show Bowyer's interference are incorrect. Under FRCP Rule 803(3), evidence of a statement of a declarant showing he intends to do an act, is admissible in support of an inference he did the act, providing proof of the act is relevant. *United States v. Jackson,* 579 F.2d 840 (4th Cir. 1978).

The Magistrate's report states that Lamb takes issue with the concept that a non-party cannot bring an action to punish another for actions that are within it's rights under the contract. *At no time has Petitioner ever stated or implied that he was claiming that Respondent had interferred with its own contract.* On a reduction in work, MTI, *not Union Carbide,* was to increase or decrease *the number* of its assigned employees. Therefore, when Respondent informed Petitioner that *he* was terminated, it was not acting within the terms of it's contract.

Respondent persists in erecting the straw man named Lamb who contends that Respondent interferred with its own contract, and then knocks him down. Respondent's claim that Mabie was not hired to replace Petitioner is a sham. It has not been refuted that Mabie was escorted to Petitioner on the first hour of his first day of employment and Petitioner was instructed to show him all his work. Respondent states that Petitioner argued that Bowyer wanted him replaced because he was dissatisfied with Petitioner's work. This is a contention by the Respondent, not Petitioner.

Respondent misstates Goff's Affidavits to suit its own purposes. When Goff's Affidavits support its theory of the privilege of the occasion they are accepted as true. When they destroy the privilege they are characterized as Goff's later denials. Goff's second Affidavit states that "When we got there *it was obvious* that the problem had been corrected." (Actually, Goff himself had corrected it days earlier and did not know why he was going to the site when his supervisor asked him to accompany him and Mr. Mabie). Respondent misstates Goff's Affidavit by saying that he indicated that he did not hear Mabie. Goff's statement was that he wasn't sure that he had heard him *correctly*. Mabie's statement *startled* him, so he asked "How's that?" Mabie then repeated his slanderous statement. The facts are misstated when Respondent states that Petitioner contended that he learned of the slanderous remarks from Goff. The record shows that Petitioner asked Goff *to whom* Mabie made the statement. Obviously, the statement had already gotten outside the Corporation. Had it not, Petitioner could not have known about it prior to his conversation with Goff. This is evidence. It is Goff's sworn statement. Petitioner did not contend that the statements were published *when Goff told him about them,* as Respondent has claimed.

Respondent raises the issue of the District Courts finding of lack of publication. Quoting from Prosser Chapter 19 page 798 5th ed. 1984, "There may be publication to any third person. It may be made to a member of the plaintiff's family, including his wife, or to the plaintiff's agent or employee. *It may be made to the defendant's own agent, employee or officer, even where the defendant is a corporation.*" (Italics supplied) *Fulton v. Atlantic Coast Line Railroad Co.*, 220 S.C. 287 (1951); *Bacon v. Michigan Central Railroad Co.*, 21 N.W. 324 (1884); *Kennedy v. James Butler, Inc.*, 245 N.Y. 204 (1927); *Cochran v. Sears, Roebuck & Co.*, 34 S.E.2d 296 (1945). Petitioner submits that the finding by the District Court confuses publication with privilege.

Rather than being a fact specific determination, as Respondent characterized in its QUESTION PRESENTED, the District Court's finding simply accepts the recommendation of the Magistrate, who copied his conclusions from the Respondent's Pleadings. (See Petition for Certiorari Appendix at A6). The Appeals Court affirms the findings of the District Court.

Petitioner submits that this case is a factually intensive case that is exceedingly within the province of the Jury. Not only does a controversy of genuine material fact exist, but there is a controversy involving motive, intent, credibility and bias. Petitioner's objections to the Magistrate's report alone would be more than 30 pages, when printed to the Court's requirements.

Petitioner is not asking this Court to decide this case. He is asking this Court to affirm his Constitutional right to a jury trial and remand this case to the District Court to proceed correctly, according to The Common Law.

CONCLUSION

For the reasons set forth in the Petition for Certiorari and for the reasons set forth in this Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Affidavit of Norman J. Mabie,
Dated January 8, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 2-91-1049

CARL V. LAMB,

Plaintiff,

v.

UNION CARBIDE CORPORATION,

Defendant.

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

This day personally appeared before me the undersigned authority, Norman J. Mabie, who being by me first duly sworn to his oath, deposes and says as follows:

1. That I am a Mechanical Engineer for Union Carbide Chemicals and Plastics Company Inc., formerly known as Union Carbide Corporation ("Union Carbide").

2. That I have personal knowledge of the statements made in this affidavit.

3. That I was hired by Union Carbide on May 28, 1991.

4. That although I have some background in heating, ventilation and air conditioning ("HVAC") work, as of this date I have only undertaken one HVAC project for Union Carbide.

5. That I have never made a statement to anyone to the effect: "This must be another one of Carl Lamb's screwups." Nor have I made any criticism of Mr. Lamb's work to any person.

Further this affiant saith not.

NORMAN J. MABIE
Norman J. Mabie

The foregoing instrument was acknowledged before me this 8th day of January, 1992 by Norman J. Mabie.
My Commission expires March 20, 2001.

JANICE S. MARSH
Notary Public

OFFICIAL SEAL
NOTARY PUBLIC STATE OF WEST VIRGINIA
JANICE S. MARSH
JACKSON & KELLY
P.O. BOX 553 CHARLESTON, WV 25322
My Commission Expires 03-20-2001